be arguably said to have emerged from section 52 of the Service Tax Act 1975 on the one hand, and sections 292 and 191 of the Companies Act on the other hand, on the question of the priority of payment between the service tax and the other claims for priority, notably and including the principal and interest due in respect of the debenture. In my judgment, the answer should be obvious that the earlier Companies Act 1965 must give way to the later Service Tax Act 1975 because this is one of the elementary rules of interpretation of statutes as *lex posterior derogat priori.*

I therefore concluded that the claim of the said department was to be paid first before the claim for the said principal and interest of the debenture holder, *i.e.* the bank.

I feel I ought to mention about the claim for costs and expenses of the receiver for which the receiver had given the first place in his proposed order of preference as set out in the originating summons. For the same reasons that a federal tax has been deliberately excluded as a preferential debt by the deliberate omission of the draftsman to extend to such federal tax such preferential status as described above, the claim by the receiver for preferential status also for his costs and expenses fell to the ground by the same token, disconcertingly perhaps to the receiver herein, but inevitably so. While the service tax was resuscitated by the Service Tax Act as to priority, a receiver's claim of priority for his costs and expenses has not been so provided. The claim of a receiver for his costs and expenses would therefore be primarily a matter between him and those who employ him.

I therefore gave judgment in terms as follows:

"(1) The court declares that the Ketua Pengarah Kastam is entitled to payment in priority to the claim of the debenture holder.

It is further ordered that out of the sum of $295,000 in the hands of the receiver, a sum of £103,520 to be paid to the Ketua Pengarah Kastam.

(2) There will be no order as to costs as between the Ketua Pengarah Kastam and the receiver.

(3) That the receiver be entitled to costs to this application against the debenture holder.

(4) That the receiver be entitled to be paid by the debenture holder the costs of his application and his expenses."

Order accordingly.

Solicitors: *Azman, Davidson & Co.*

BEHN MEYER & CO. (M) SDN. BHD. v. AGROPHARM SDN. BHD. & ORS. (ESKOS PRINTING HOUSE SDN. BHD. & ORS., GARNISHEES)

[A.C.J. (V.C. George J.) June 12, 1986]

[Kuala Lumpur – Civil Suit No. C1944 of 1984]

Civil Procedure – Garnishment proceedings – Order made absolute – Subsequent order made to set aside original order – Whether court has jurisdiction to set aside its own order – Principles applied.

The plaintiffs entered trial judgment against the three defendants for a certain sum. Among various steps taken to recover the judgment sum were garnishment proceedings against, *inter alia,* the Federal Land Development Authority (FELDA). FELDA owed one of the defendants a certain sum of money. At the hearing of the proceedings, the garnishment order nisi was made absolute and a consent order was made. On April 8, 1985, I.C.I. Agriculture (M) Sdn. Bhd., as an intervener, filed an application seeking, *inter alia,* for an order that the garnishment order absolute be set aside. The Senior Assistant Registrar allowed the application and set aside the order absolute. The plaintiffs appealed.

Held, allowing the appeal: (1) in respect of a garnishee order absolute, there is no express or implied rule or principle that allows the court that made the order absolute to alter, vary or set aside the order;

(2) the court had no jurisdiction in the instant case to set aside the order made absolute and therefore that order was reinstated.

Cases referred to:

(1) *Hock Hua Bank Bhd.* v. *Sahari bin Murid* [1981] 1 M.L.J. 143.
(2) *Mullins* v. *Howell* (1879) 11 Ch.D. 763.
(3) *Marshall* v. *James* [1905] 1 Ch. 432.
(4) *Moore* v. *Peachey* (1892) 66 L.T. 198.

APPEAL FROM REGISTRAR'S DECISION.

Francis I. Brigged for the appellants.

Robert A. Lazar for the respondent/intervener.

Cur. Adv. Vult.

V. C. George J.: The plaintiffs entered final judgment against the three defendants for an amount over a million ringgit. Among various steps taken to recover the judgment sum were garnishment proceedings against, *inter alia,* the Federal Land Development Authority (FELDA) who appeared, through one of its officers, before the relevant Senior Assistant Registrar at the hearing of the notice to show cause and upon that officer not disputing the alleged liability of Felda to pay to the first defendant $103,951 the garnishment

order nisi was made absolute and a "consent order" was entered on March 28, 1985 requiring FELDA to "forthwith pay to the said judgment creditors $103,951, the debt due from the said abovenamed third garnishees to the abovenamed first judgment debtor, Agropharm Sdn. Bhd...".

On April 8, 1985, after FELDA had paid the plaintiffs the said amount, I.C.I. Agriculture (M) Sdn. Bhd., as an intervener, filed an application seeking leave to be added as a party in the garnishment proceedings and asking for the garnishment order absolute to be set aside and consequential thereto for directions presumably in respect of a re-hearing of the issue as to whether the order nisi should be made absolute. It turned out that the first defendant, Agropharm Sdn. Bhd., owed the intervener substantial sums of money and that Agropharm Sdn. Bhd. had "authorized FELDA in writing on June 11, 1984 to make payments due to it direct to the intervener". It was contended by the intervener that thereby there had been an assignment of the debt due to the first defendant from FELDA to the intervener. The Senior Assistant Registrar allowed the application and set aside the order absolute. The plaintiffs appealed.

The real issue in this appeal is whether the Senior Assistant Registrar had jurisdiction to set aside her own order.

Generally, upon the order of a court being perfected, the judge or registrar who made the order becomes *functus officio* vis-a-vis the matter. It is well established that the court has no power, on any application in the same action, to alter, vary or set aside an order regularly obtained after it is drawn up except under the provisions of certain rules that specifically allow the court to do so. Chang Min Tat F.J. in *Hock Hua Bank Bhd.* v. *Sahari bin Murid*[1] said:

"Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 of the Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St. Nazaire Co.* [(1879-80) 12 Ch. D. 88], *Kelsey* v. *Doune* [(1912) 2 K.B. 482], *Hession* v. *Jones* [(1914) 2 K.B. 421], unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment."

The other exception to the general rule is where the order itself reserves to the court the right to alter, vary or set aside the order as in the cases where one of the terms of the order is to grant the parties "liberty to apply" and in respect of, say, interlocutory injunctions where the court may have reserved to itself the right to interfere with the terms of the order, usually by the use of the phrase "until further order".

In respect of a garnishee order absolute, I know of no such express or even implied rule or any principle that similarly allows the court that made the order absolute to alter, vary or set aside the order.

My attention was drawn to *Mullins* v. *Howell*[2] where Jessel M.R., having said that he had no doubt that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, significantly in fact refused to discharge the order although he accepted that it had been made under a mistake. Instead, he left the order alone and called the aid of equity to refuse to enforce the order.

In *Marshall* v. *James*[3] Joyce J., following the judgment in *Moore* v. *Peachey*[4] "and on general principles", set aside a garnishee order absolute that caused injustice. What "general principles" he relied on are not divulged. In *Moore* v. *Peachey*,[4] there was an unjust garnishee order that had been made absolute. Cave J. in expressing the opinion that the order should be set aside said:

"No authority has been cited to me to show that this court has no power to set aside a garnishee order (made absolute by consent given by mistake)."

Charles J., sitting with Cave J., gave no reasons for agreeing that the order could be set aside.

These old English decisions cannot be said to be reasoned decisions and run contrary to the principles and reasoning expressed and given by the Federal Court in the *Hock Hua Bank Bhd.* case. The question is not whether the order ought to be set aside but whether the court has the jurisdiction to do so.

Following the *Hock Hua Bank Bhd.* judgment, I held that in the instant case the court has no such jurisdiction and I allowed the appeal and reinstated the garnishee order absolute.

Appeal allowed.

Solicitors: *Amir Toh, Francis Khoo & Partners; Shearn Delamore & Co.*